

July 27, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0143

Mara Rosales, Esq.
Rosales Law Partners, LLP
433 California Street, Suite 630
San Francisco, CA 94104

Dear Ms. Rosales:

Tiare Enterprises, Inc., appeals the Hawaii Unified Certification Program's (HUCP) decertification of the firm as an Airport Concession Disadvantaged Business Enterprise (ACDBE) under the standards of 49 C.F.R. Parts 23 and 26 (the Regulation).¹

HUCP's December 18, 2013, Notice of Intent states the following grounds for the proposed action:

- (1) Disadvantaged owner's personal net worth (PNW) in excess of §26.67(a)(2) cap of \$1.32 million;²
- (2) Owner's demonstrated ability to accumulate substantial wealth results in her not being reasonably or fairly regarded as "economically disadvantaged;"³ and

¹ Appeal Brief dated June 30, 2014; HUCP Notice of Decertification dated April 2, 2014. We concur with the appellant that the decertification notice newly raises arguments based on the business owner's adjusted gross income, which the Notice of Intent did not specifically contain. However, the Notice of Intent squarely framed the underlying issue of the owner's ability to accumulate substantial wealth under Regulation Appendix E and the Department's related formal guidance. Notice of Intent dated December 18, 2013, at 2. Income generation can reasonably be considered a dominant, if not primary, driver of wealth accumulation.

² Tiare's owner Roberta Fithian filed a personal financial statement (PFS) dated November 4, 2013, showing total assets of **REDACTED** and total liabilities of **REDACTED**. Because we find, *infra*, "Other Liabilities" in the amount **REDACTED** unallowable, the owner's PFS shows effective PNW of **REDACTED**, a net worth that is within **REDACTED** of the §26.67(a)(2) ceiling under which PNW must remain in order for the owner to enjoy the presumption of economic disadvantage.

³ Appendix E and the Department's formal guidance relating to §26.67 were in full force at the time of the Notice. Although the text of *the Regulation* changed in November 2014, after HUCP's decision, specifically to authorize (but not require) an analysis of factors such as gross income, the Department made clear in the Preamble to the final rule that the changes were clarifications of existing rules and an attempt to bring existing formal guidance and appendix rules into the text of the Regulation. 79 FR 59566 at 59568-69 (October 6, 2014). Those rules authorized, as HUCP indicates in its Notice of Intent, an analysis of the owner's overall economic situation, notwithstanding

- (3) Failure to cooperate with certifier requests for certification-related information within the meaning of §26.109(c).⁴

Per §26.87(e), HUCP brought in an independent decisionmaker, in this case Angela de la Rosa, of the California UCP to hear HUCP's arguments for decertification and Tiare's arguments in rebuttal. In a decision dated March 24, 2014, Ms. de la Rosa determined that HUCP proved Tiare's owner is not economically disadvantaged⁵ and that Tiare "failed to provide sufficient information to refute HDOT's findings," i.e., failed to cooperate. HUCP's April 2, 2014 Notice of Decertification under §26.87(g) references Ms. de la Rosa's decision and states as the ground for its decision §26.87(f)(1) changed circumstances that render the firm unable to meet the eligibility standards. The Notice specifically concludes that the owner is not fairly regarded as being economically disadvantaged (on grounds of (1) excess PNW and (2) accumulation of substantial wealth) and that the firm (3) failed to cooperate.

We affirm HUCP's decision on grounds (1) and (2) as supported by substantial evidence and not inconsistent with the Regulation's substantive and procedural certification provisions. *See* §26.89(f) (1).⁶ HUCP proved, by a preponderance of the evidence, that its owner's PNW exceeds **REDACTED**, rendering the owner non-disadvantaged and the firm ineligible for continued certification; and that a reasonable person would not consider Roberta Fithian, in light

reported PNW under the regulatory cap.

⁴ Appellant objects strenuously to this rationale. While we based our disposition primarily on the substantive grounds of excess PNW and rebutted presumption of economic disadvantage, we also find that Tiare failed to cooperate fully, as the Regulation requires, with the certifier's reasonable requests for eligibility-determinative information. This ground alone is sufficient for affirming the decertification. *See generally* §26.109(c) (remedy for failure to cooperate includes decertification).

⁵ In addition to the asset-based analysis the Notice of Intent contained, Ms. de la Rosa's determination discusses income-related facts in the record, namely, that Ms. Fithian reported adjusted gross income (AGI) on her personal tax returns of **REDACTED** in 2011 and **REDACTED** in 2012. These numbers compare with the following incomes for taxpayers in the top tenth of one percent of all taxpayers in income **REDACTED** in 2011; **REDACTED** in 2012. The decision makes the point that Ms. Fithian's AGI numbers are firmly within the top tenth of one percent of all taxpayers. *Cf.* §26.67(b)(ii)(A)(1) (three-year average AGI exceeding **REDACTED** a factor in rebutting presumption of economic disadvantage based on PFS showing ability to accumulate substantial wealth).

⁶ We are unpersuaded that HUCP denied Tiare the opportunity for and informal hearing that §26.87(d) requires. We read the evidence as being clear that HUCP offered precisely that opportunity but that Tiare declined to request the hearing within the time prescribed for doing so in the Notice of Intent and related correspondence. Although Tiare purports unilaterally to have reserved its right to "invoke" such a hearing in e-mail of December 20, 2013, the record shows that Tiare never actually requested a hearing until April 24, 2014, some three months after it submitted written arguments (timely on January 30, 2014) and more than three weeks after HUCP's Notice of Decertification. When it filed its written arguments on January 30, 2014 without requesting a hearing and did not request a hearing by January 31, 2014 (the extended deadline for doing so), it waived its right to have an informal hearing.

We agree with the appellant that the Regulation does not impose an either/or choice. It allows both oral and written presentations in rebuttal. The appellant simply failed timely to request the informal hearing that §26.87(d) provides.

of all of her economic circumstances, to be economically disadvantaged.⁷

Applicable Regulation and Guidance Provisions

Section 23.31(a) states:

“As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§26.61-91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (*see* part 26, §26.81).”

Official Department Guidance pertaining to §§23.31 and 26.67(b)(2) states:

“A person cannot be regarded as economically disadvantaged if he or she exceeds the \$1.32 million personal net worth (PNW) cap. However, there may be some cases in which an individual whose PNW is less than \$1.32 million may properly be regarded as not being economically disadvantaged.

The legal and policy rationale behind the PNW provision of the rule is that a program designed to assist socially and economically disadvantaged individuals should not include people who can reasonably be regarded as having accumulated wealth too substantial to need the program’s assistance.

Consequently, in determining whether an individual is economically disadvantaged, a recipient is entitled to look not only at the individual’s PNW but also at his or her overall economic situation to make a reasonable determination of whether the individual is fairly regarded as being economically disadvantaged.

This guidance applies to determinations of economic disadvantage under both 49 CFR Part 23 and 49 CFR Part 26.”

Section 26.67, at the time of the decertification, read:

“(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) You must require each individual owner of a firm applying to participate as a DBE, whose

⁷ In light of our disposition, we need not reach the issue of cooperation.

ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed \$1.32 million.

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. To meet this requirement, you must use the DOT personal net worth form provided in appendix G to this part without change or revision. Where necessary to accurately determine an individual's personal net worth, you may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.

(iii) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or State law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under §26.89 of this part or to any other State to which the individual's firm has applied for certification under §26.85 of this part.

(b) Rebuttal of presumption of disadvantage.

(1) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be rebutted with respect to that individual. Your proceeding must follow the procedures of §26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the

evidence, that the individual is not socially and economically disadvantaged. *You may require the individual to produce information relevant to the determination of his or her disadvantage.*

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. *You must require that applicants provide sufficient information to permit determinations under the guidance of appendix E of this part.*” (Emphasis added)

Section 26.67, as of November 2014, reads:

“(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed \$1.32 million.

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. To meet this requirement, you must use the DOT personal net worth form provided in appendix G to this part without change or revision. Where necessary to accurately determine an individual's personal net worth, you may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the

owner's spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.

(iii) In determining an individual's net worth, you must observe the following requirements:

- (A) Exclude an individual's ownership interest in the applicant firm;
- (B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.
- (C) Do not use a contingent liability to reduce an individual's net worth.
- (D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or State law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under §26.89 of this part or to any other State to which the individual's firm has applied for certification under §26.85 of this part.

(b) *Rebuttal of presumption of disadvantage.* (1) An individual's presumption of economic disadvantage may be rebutted in two ways.

(i) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

Example to paragraph (b)(1)(i): An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than \$1.32 million. However, the person's assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged. The recipient may rebut the individual's presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual's PNW is less than \$1.32 million.

(ii)(A) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is

rebutted. In making this determination, as a certifying agency, you may consider factors that include, but are not limited to, the following:

- (1) Whether the average adjusted gross income of the owner over the most recent three -year period exceeds **REDACTED**;
- (2) Whether the income was unusual and not likely to occur in the future;
- (3) Whether the earnings were offset by losses;
- (4) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;
- (5) Other evidence that income is not indicative of lack of economic disadvantage; and
- (6) Whether the total fair market value of the owner's assets exceed **REDACTED**.

(B) You must have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of §26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount.

(c) *Transfers within two years.* (1) Except as set forth in paragraph (c)(2) of this section, recipients must attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients must not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of appendix E of this part.”

Section 26.87, relating to decertification, states in pertinent part:

“(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

* * *

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

- (1) Your method of implementing this requirement must be made part of your DBE program.
- (2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.
- (3) Before a UCP is operational in its state, a small airport or small transit authority (*i.e.*, an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

- (1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;
- (2) Information or evidence not available to you at the time the firm was certified;
- (3) Information relevant to eligibility that has been concealed or misrepresented by the firm;
- (4) A change in the certification standards or requirements of the Department since you certified the firm;
- (5) Your decision to certify the firm was clearly erroneous;
- (6) The firm has failed to cooperate with you (see §26.109(c));
- (7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2)); or
- (8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.”

Section 26.89(f) provides in pertinent part:

- “(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.
- (2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.”

Finally, section 26.109(c) states:

“Cooperation. All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).”

Pertinent Facts

We incorporate by reference facts stated elsewhere in this decision, including in footnotes.

HUCP certified Tiare as an ACDBE in 1986. Tiare won a contract with DFS Construction the same year and later became a prime concessionaire at Hilo and Kona airports. Declaration of Roberta Fithian dated June 23, 2014. As far as the administrative record (we have reviewed it thoroughly and with care) reveals, there was no issue of Tiare’s continuing eligibility until late 2013.

Tiare filed its owner’s new PFS in November 2013. The PFS, as stated in footnote 2, reports that Tiare’s owner Roberta Fithian owns substantial assets. Ms. Fithian reports savings of approximately **REDACTED**, cash on hand of roughly **REDACTED**, retirement assets of **REDACTED**, and stocks worth nearly **REDACTED**. The remaining entries on the asset side of the statement are several parcels of Hawaiian real estate valued at **REDACTED**; a life insurance policy in the amount **REDACTED**, the surrender value of which is **REDACTED**; and “Other Assets” of **REDACTED**.⁸

⁸ Like the appellant, we ignore for purposes of the PFS the value of Ms. Fithian’s primary residence, for that value

On the liabilities side of the ledger, Tiare lists a mortgage of **REDACTED**, attributable to one of the non-primary-residence properties, and “Other Liabilities” of **REDACTED**. Tiare explains that the liability derives from an arrangement under which Peter and Roberta Fithian lent money to a company that Mr. Fithian owns and controls. (The record is unclear regarding whether Ms. Fithian ever owned part of that company and whether the two-year transfer rule of Appendix E and (new) §26.67 would apply to a transfer of her ownership interest.) The Fithians contend that in repayment of the loan, that company, **REDACTED REDACTED**, was to have paid the Fithians’ mortgage for a period of time. The mortgage payments related to the primary residence at **REDACTED**. Accordingly, Tiare appears to argue, the payments would benefit Mr. and Ms. Fithian equally.

There is no underlying loan document in the record concerning funds alleged to have been advanced to Greeters of Hawaii. There is no agreement concerning the amount, timing, or mode of repayment. Nevertheless, Tiare alleges on appeal that Greeters actually overpaid the Fithians **REDACTED** lars, an overpayment it contends was inadvertent. That overpayment gives rise, according to Tiare, to the similarly underdocumented claimed liability to Greeters, Ms. Fithian’s 50% share of which is the “Other Liability” in the amount **REDACTED**. Brief at 26 (“A subsequent analysis...showed that GOH had mistakenly paid **REDACTED** of dollars more than the loan amount.”)

The PFS reports that Ms. Fithian’s primary residence **REDACTED**, purchased for **REDACTED** in 2006, is still worth exactly that amount. It reports a jointly owned 3-bedroom, 2-bathroom house at **REDACTED**, as purchased in 1970 for **REDACTED** and presently worth **REDACTED**. Similarly, the PFS reports a solely-owned condominium at **REDACTED**. There are, further, two parcels of undeveloped land: **REDACTED**, comprising 11 acres of a 40 acre parcel in **REDACTED** which Ms. Fithian values at **REDACTED**, and Parcel 2, Green Lake Farms, comprising 5.17 acres in **REDACTED** valued at **REDACTED**. In all cases, the appellant indicates that these values are the market values that the local property tax jurisdiction uses to assess property tax and that these values⁹ are Ms. Fithian’s allocable share of these overall assessed values. Brief at 21-22.

HUCP asked Tiare for additional information concerning the real estate, the “Other Liability” in the amount **REDACTED**, and Ms. Fithian’s stated value for all other personal property of just **REDACTED**. Tiare conceded that it had erred in not reporting the value of Ms. Fithian’s 2006 Volvo as **REDACTED**. Tiare further responded with information that the Fithians’ homeowner’s insurance policy values their personal property at a percentage of the amount required to rebuild the dwelling, Brief at 22-3. Tiare does not dispute that Ms. Fithian’s share of personal property coverage is **REDACTED**, as HUCP states in the Notice of Intent at 3. Rather, Tiare maintains that the coverage amount is unrelated to the value of Ms. Fithian’s personal

and the balance of any mortgages on that property are generally excluded from the PNW calculation, per §26.67(a)(2)(iii)(B). Ms. Fithian’s homeowners’ insurance policy insures her personal property within the dwelling for **REDACTED**. Notice of Intent at 2; Brief at 23.

⁹ Ms. Fithian reports her 50% share of the total value of **REDACTED** as **REDACTED**.

property. Ms. Fithian specifically contends that she owns no item or category of personal property worth more than **REDACTED**—not clothing, artwork, furniture, or jewelry—and that the complete value of all of her personal property is **REDACTED**. Fithian Declaration at 2; Brief at 17.

The alleged failure to cooperate concerns Ms. Fithian's nonproduction of loan documents relating to the alleged debt to Greeters and her nonprovision of a list and description of assets worth more than **REDACTED**

Having obtained from Tiare the assessed values for the several real estate parcels, HUCP undertook its own market value research. It turned to commonly used real estate websites including Zillow and Trulia. Notice of Intent at 3 and Exhibit 7 thereto; Brief at 18.

Walua Road

Ms. Fithian's PFS values the **REDACTED REDACTED** home at **REDACTED**. That property consists of three bedrooms and two bathrooms in **REDACTED** square feet. Trulia.com (12/17/13). HUCP obtained a range of values from Trulia for properties near the **REDACTED** home. HUCP found a May 2013 sale of a similarly-sized two bedroom property at **REDACTED** Walua Road for **REDACTED**. HUCP found multiple other arguably comparable (based on rooms, square footage, and location) properties in the area with asking prices between **REDACTED**. Nearby sales in 2013 averaged **REDACTED**. Asking prices for nearby houses for sale in late 2013 averaged just under **REDACTED**. HUCP contends, based on its research, that the market value of the Walua Road property is **REDACTED**. HUCP would allocate half of this amount, **REDACTED** to Ms. Fithian.

Mamala Hoa Highway

Ms. Fithian's PFS values the Mamala Hoa Highway condominium, in Kona Coffee Villas, at just **REDACTED**, less than the 1980 purchase price. Ms. Fithian's tax returns for 2011 and 2012, the most recent available at the time of the Notice of Intent, show that the property was then rented for **REDACTED** per month. HUCP would value this property at **REDACTED** based on a 2006 sale of another unit in the same condominium and based on its demonstrated income producing potential. The sold unit consists of 2 bedrooms and two baths in 853 square feet. The record does not confirm the room count or square footage of the Fithians' unit, nor does it show more recent sales in **REDACTED**. HUCP allocates one half of the **REDACTED** asserted value, or **REDACTED**, to Ms. Fithian.¹⁰
REDACTED

¹⁰ The allocation is in apparent error, as the property tax records the appellant provided show that this property is titled exclusively in the name of the Roberta B. Fithian Trust. Ms. Fithian's own PFS allocated the entire assessed amount to Ms. Fithian.

Ms. Fithian reports that she owns this property outright.¹¹ The PFS reports the value of this property as **REDACTED** HUCP (Exhibit 7C) values the property at **REDACTED**. HUCP appears to base its estimate on a LoopNet listing of 36 acres in the same subdivision for **REDACTED** per acre. Loopnet.com/Listing/**REDACTED**

5.174 Acres in Green Lake Farm

The PFS reports Ms. Fithian's share of the value of this parcel as **REDACTED**, consistent with the County of Hawaii's fiscal 2012 real property assessment notice **REDACTED** total for a property that Peter and Roberta Fithian own jointly through their eponymous trusts). HUCP's valuation is **REDACTED**, based on one third of the asking price of a 15.5 acre parcel on the market for 1441 days before being withdrawn. **REDACTED**

Discussion

Personal Net Worth

a. Real Property

The burden is on HUCP in a decertification proceeding to demonstrate that the firm is ineligible. §26.87(d)(1). The proof must be by a preponderance of the evidence, which, the parties agree, means somewhat more likely than not. *See, e.g.*, Brief at 20 ("preponderance of the evidence" means "51% of the evidence"). This is the most lenient of the standards of evidence in common usage in civil or criminal proceedings.

When working with comparable properties, there is more likely to be a range of market values than one perfect one. The appellant takes issue with the use of real estate websites to estimate value. As the appellee notes, however, the Department itself argues for checking value by these means. *See generally* Module 6, DBE Certification Training, available online at dot.gov. We do not assert that Zillow and Trulia and their ilk are perfect or free of miscalculations. We state merely that error rates and relative authoritativeness affect probative value.

We find some of the appellee's arguments regarding the real property valuations more compelling than others. In the case of the **REDACTED**, HUCP proffers a recent, actual sale of an almost identically sized house across the street from Ms. Fithian's. It is a fair inference that Ms. Fithian's three bedroom home would tend to command a higher value than the comparable two bedroom home, which sold for **REDACTED**. We concur that it is more likely than not that the value of the **REDACTED**, and we allocate half of that amount **REDACTED** to Ms. Fithian's reported PFS. **The result raises reported PNW by REDACTED reported)**
REDACTED

For the Kona Coffee Villas condominium, we find HUCP's 2006 sale less directly comparable.

¹¹ The property tax record shows 4 named owners of the entire 40 acre parcel. The appellant contends on appeal that Ms. Fithian owns 27.5% of the property, which is fully consistent with the PFS position that she owns 100% of 11 acres.

Although the unit is in the same development as is Ms. Fithian's, the sale is less recent, and the record does not confirm that Ms. Fithian's unit is a similarly sized, two bedroom, two bath unit. On the other hand, the rent that Ms. Fithian reports on her Schedule E confirms that the property has a very high rental value. **REDACTED** market value HUCP places on the condominium is more than reasonable considering its history of producing income at the rate of **REDACTED** a year. We affirm that the **REDACTED** condominium, more likely than not, is worth at least **REDACTED**, based on all of the facts and circumstances. It is highly unreasonable, on the evidence before us, for the property to be worth less now than it was in 1980—or to be worth less than the rent it produces in sixteen months, as the appellant contends. **REDACTED**

We decline to adjust the value of either of the two parcels of undeveloped land because HUCP proffers no actual sale that it deems to be comparable. Asking prices are poor indicators of market value when the underlying properties do not sell.

The appellant argues that we should not accept information from Trulia or Zillow as an accurate estimate of market value. We disagree. We believe real estate websites, particularly the big names in the sector, are useful aggregators of information. To the extent that the appellant argues median error rates, Brief at 19 ff., the argument is misplaced. Any deviation from current fair value can as easily be in appellant's favor (as is more likely to be the case in a rising market) as against it. The appellant was free to have the underlying property appraised and to present appraisal evidence by way of rebuttal to HUCP's evidence of market value. It chose not to do so. Accordingly, we weigh the evidence that we have and affirm to the extent stated.

b. Liabilities

For the liability in question, all that the appellant offers as evidence is a statement of account from Greeters and the Fithian Declaration, which is vague regarding any particulars. There is no documentation of the amount of the original debt, the payments on that debt (number or amounts or timing), or of the alleged overpayment. To say that the accounting is unorthodox would be an understatement. DBE program integrity demands that real debts be documented. Otherwise, debts can easily be manufactured, particularly among related persons (legal and corporeal). We affirm HUCP in declining to consider such an obligation actually documented and owing.

Nowhere does the record disclose when the obligation arose or under what terms the Fithians must repay Greeters. It is the applicant's burden, in signing a PFS and attesting to its accuracy, of proving the existence of a bona fide debt. The only evidence in the record is a fill-in-the-blanks account statement from Greeters, as if the Fithians had ordered services from Greeters. There is a balance at August 31, 2013 but no evidence of when the obligation arose, what the repayment terms may be, or whether any repayments were ever made. For all the record reveals, the obligation is simply open-ended. We must discount the probative value of a mere account statement, without more, from a non-DBE firm controlled by the husband of Tiare's owner. With no payments made or due and no apparent interest charged, such a "debt" could go unpaid forever. We do not accept the debt as bona fide. This adjustment increases PNW by the amount of the claimed obligation: **REDACTED**

c. Other Personal Property

We find it borderline incredible that a woman with **REDACTED** and effective cash equivalents attests on penalty of perjury that she owns no more than **REDACTED** in personal property. HUCP specifically asked about jewelry, furniture, vehicles (all types), artwork, and collectibles. See, e.g., E-mail from HUCP to Roberta Fithian dated October 31, 2013. HUCP would increase the value of Ms. Fithian's **REDACTED** reported to the insured value of her personal property, which is **REDACTED**. We decline to make that adjustment as it is supported by no evidence that Ms. Fithian actually owns other property in that amount.

The consensual addition of the Volvo to the PFS raises Ms. Fithian's PNW by **REDACTED**

The adjustments made above to the November 3, 2013 PFS bring Ms. Fithian's PNW to **REDACTED**. We affirm HUCP's decertification on the ground of excess personal net worth.

Ability to Accumulate Substantial Wealth

Substantial evidence supports HUCP's determination that Roberta Fithian has demonstrated an ability to accumulate significant wealth. Ms. Fithian's PFS shows her own share of cash on hand to be in excess of **REDACTED**; savings in excess of **REDACTED**; a retirement account in excess of **REDACTED**; and stocks worth nearly **REDACTED**—for total liquid assets¹² of approximately **REDACTED**.

Ms. Fithian has accumulated 4 pieces of real property, other than her principal residence, worth (by her own valuation except as adjusted above) an additional **REDACTED**. The Fithians' principal residence has an assessed value of **REDACTED**,¹³ Ms. Fithian's share of which is **REDACTED**. Ms. Fithian reports total assets valued at least **REDACTED**. In addition, Ms. Fithian's adjusted gross income for the two most recent years for which data are available show robust earning power - Ms. Fithian's AGI of **REDACTED** in 2011 and **REDACTED**. We affirm HUCP's determination, under the Department's official guidance concerning §§23.31 and 26.67, that a reasonable person would not consider Ms. Fithian to be economically disadvantaged. HUCP carries its burden of proof in rebutting the presumption of economic disadvantage. See generally §§26.67(b)(2), 26.87(b) and (d)(1).

¹² Ms. Fithian has reached the age beyond which there are no penalties for early withdrawal of amounts in her retirement account.

¹³ Based on Zillow data, HUCP asserts that the home is worth more than **REDACTED**

Conclusion

We affirm the decertification as supported by substantial evidence and consistent with the certification provisions of Parts 23 and 26. We specifically find that HUCP met its burden of proof regarding excess PNW and rebutting the presumption of economic disadvantage (demonstrated ability to accumulate substantial wealth). This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights Programs Division

cc: HUCP